



38 CFR Part 3

Instruction of the Secretary and General Policy Statement on the Administration of Benefits for Particular Same-Sex Surviving Spouses

AGENCY: Department of Veterans Affairs.

ACTION: General policy statement.

SUMMARY: The Department of Veterans Affairs (VA) announces that the Secretary of Veterans Affairs issued Instruction 01-22 on October 11, 2022, which addresses the legal impediment that exists for certain same sex-surviving spouses to qualify for Survivors Pension or Dependency and Indemnity Compensation (DIC) benefits due to not meeting the duration of marriage requirements for those benefits because they were prevented from marrying at an earlier date by reason of laws that have been found to be unconstitutional. Additionally, VA announces Pension and Fiduciary Service's general policy statement on the administration of Veterans Benefits Administration (VBA) benefits for particular same-sex surviving spouses.

DATES: The Pension and Fiduciary Service's general policy statement is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kevin Baresich, Program Analyst, Pension and Fiduciary Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, 202-632-8863. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Instruction of the Secretary 01-22

Notice is given that the Secretary of Veterans Affairs issued Instruction of the Secretary 01-22 – Instructions for Determining Whether Same-Sex Surviving Spouses

Satisfy Duration of Marriage Requirements, on October 11, 2022. The text of Instruction 01-22 appears at the end of this Federal Register document.

Background

On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Accordingly, on October 16, 2015, VBA issued VBA Letter 20-15-16 which recognized that same-sex marriages will be accepted in benefit determinations without regard to a Veteran's state of residence. This guidance remains in effect.

VBA administers benefits and programs for the surviving spouse of a Veteran which incorporate evaluations to determine the legality and duration of a marriage. Determining the duration of a marriage is required to establish entitlement to Survivors Pension, DIC, or the higher rate of DIC benefits under 38 U.S.C. 1311(a)(2) (heretofore referred to as the 8x8 allowance). The rules in 38 U.S.C. 1541(f)(2), 1304(2), and 1318(c)(1) are the foundational statutory sources providing 1-year duration of marriage requirements for a surviving spouse to qualify for Survivors Pension and DIC. The requirement for the 8x8 allowance under 38 U.S.C. 1311(a)(2) further stipulates that a surviving spouse must have been married to a Veteran for at least a continuous 8-year period immediately preceding the Veteran's death during which a Veteran was rated totally disabled for a service-connected disability. This increase for DIC benefits originated from section 102 of Pub. L. 102-568 passed on October 29, 1992, and the governing statute has maintained the same 8-year duration requirement since that time.

As a result, under statutory requirements currently in effect, a same-sex surviving spouse who was only able to marry after the Supreme Court's decision in *Obergefell* would be unable to meet the 1-year marriage duration requirement until June 26, 2016,

for Survivors Pension and DIC benefits, and would similarly be unable to satisfy the 8-year marriage duration requirement for the 8x8 allowance until June 26, 2023, at the earliest. This results in potential disparate treatment for same-sex surviving spouses who may have otherwise qualified for Survivors Pension, DIC, or the additional 8x8 allowance if they were not prevented from marrying at an earlier date by reason of laws that have been found to be unconstitutional.

As provided within VBA Letter 20-15-16, VBA updated procedures on processing benefit claims involving same-sex marriages following the June 26, 2015, Supreme Court decision in *Obergefell v. Hodges*. Since that time, entitlement to VBA benefits has been granted based on the legal authorization of same-sex marriages. However, in some cases, there is a legal impediment for a same-sex surviving spouse to qualify for Survivors Pension or DIC benefits due to not meeting the corresponding marriage duration requirements. A more pronounced impediment exists for the higher rate of DIC benefits for the 8x8 allowance due to a marriage duration requirement that is currently wholly unattainable for those individuals who were unable to marry prior to *Obergefell*. In Instruction 01-22, issued on October 11, 2022, the Secretary instructed the Department to interpret the laws governing duration of marriage requirements in a manner that avoids unfairness to certain same-sex claimants by not giving effect to State laws that have been determined to be unconstitutional. The Instruction explained that while 38 U.S.C. 103 directs VA to look to State law, the Secretary presumes that Congress did not intend VA to apply those laws that have been determined to be unconstitutional to a survivor's detriment. Therefore, based on the Instruction, VBA is establishing this general policy statement, which provides instructions and procedures for processing Survivors Pension, DIC, or the 8x8 allowance determinations for particular same-sex surviving spouses.

Instructions For Determining Whether Same-Sex Surviving Spouses Satisfy Duration of Marriage Requirements

Under 38 U.S.C. 5124(a), VBA may accept the written statement of a claimant's marriage to another individual as proof of the existence of the relationship. This statute is implemented under 38 CFR 3.204(a). To establish marriage under § 3.204(a), VBA requires only a statement by the claimant that includes the date and place of marriage and the name and social security number of the person the claimant has identified as their spouse.

The only instances when VBA will not accept a claimant's statement that they are married as being sufficient evidence to establish the claimant's marriage is when the claimant's statement on its face raises a question of validity, the claimant's statement conflicts with other evidence in the record, or there is a reasonable indication of fraud or misrepresentation. In these instances, VBA requires more information, per 38 CFR 3.204(a)(2).

As previously stated, the Supreme Court's decision in *Obergefell*, which allowed VBA to provide spousal benefits to same-sex couples, has impacted survivor benefit claims. Therefore, for survivors claims, current VBA policy allows the acceptance of a written statement asserting the marital relationship but requires a determination on whether the same-sex marriage satisfies the requirements of 38 CFR 3.50(b)(1) and (2) and 3.54. Proof of marriage requirements can also be satisfied by including the types of evidence outlined in 38 CFR 3.205(a). Thus, in keeping with these regulatory provisions, VBA will first determine eligibility for benefits by determining the existence of a marriage pursuant to 38 CFR 3.204, and then, as described in more detail below, by calculating the duration of a same-sex marriage in a liberal manner, including the application of 38 CFR 3.205(a)(6) and (7).

Qualifying for Survivors Pension, DIC, or the 8x8 Allowance

The acceptance of a valid marriage for a same-sex surviving spouse is currently not an obstacle to establishing basic entitlement for benefits. In accordance with the instructions provided in Instruction 01-22, this general policy statement addresses the marriage duration legal impediment for a same-sex surviving spouse seeking Survivors Pension, DIC, or the 8x8 allowance which exists due to now unconstitutional laws within U.S. states and territories that prevented an earlier marriage. In particular, a same-sex surviving spouse may be unable to meet the duration requirement of being married to a Veteran for 1 year or more prior to the Veteran's death under 38 CFR 3.54 to qualify for Survivors Pension or DIC benefits; or may be unable to fulfill 38 U.S.C. 1311(a)(2) for the 8x8 allowance due to the inability of establishing a marriage for a consecutive 8-year time period. U.S. states and territories maintained varying same-sex marriage provisions prior to *Obergefell*. In seeking an approach that prevents disparate impact and enables a consistent and equitable application, VBA will utilize the date for the precedential *Obergefell* decision, June 26, 2015, as the general delimiting date for policy determinations for particular same-sex marriage duration situations. VBA also acknowledges that it may have been impracticable for same-sex couples to have entered a marriage immediately after *Obergefell* was decided. As such, VBA will apply these policy considerations in the case of any same-sex surviving spouse who married a Veteran within two years of *Obergefell*, i.e., by June 26, 2017.

The Secretary signed Instruction 01-22 to address the concerns noted above, while ensuring maximum consistency with the statutory requirement regarding duration of marriage, by requiring VBA to consider a marriage duration requirement to be satisfied when there is satisfactory evidence that a same-sex surviving spouse was effectively in a marital relationship for the specified period, supporting a conclusion that they would have been legally married for that period but for the unconstitutional laws of U.S. states or territories.

In applying the standard set by the Instruction, VBA's general policy statement will follow the same evidentiary rules applicable in establishing any marital relationship. A same-sex surviving spouse will be required to provide verification that they were legally married to the Veteran at the time of the Veteran's death; that they held themselves out to the public as being in a committed relationship akin to that of marriage; and that they cohabitated, as evidenced through statements of persons in the community who knew the parties as akin to spouses and documents which show that the parties represented themselves as being in a committed relationship akin to that of marriage (see evidence requirements in 38 CFR 3.205(a)), for a minimum of 1 year prior to the Veteran's death for Survivors Pension and DIC entitlement.

The Secretary's instructions will similarly be applied in the general policy statement by awarding the 8x8 allowance if the surviving spouse is able to provide the same verification for a period of 8 consecutive years prior to the Veteran's death during which time the Veteran was rated totally disabled for a service-connected disability. The Instruction outlines that verification of the status of the relationship to establish entitlement to Survivors Pension, DIC, or the 8x8 allowance will utilize pertinent existing procedural requirements for establishing the validity of a marriage relationship. Under those procedures, VA requires the claimant to provide the following:

- VA Form 21-4170,
- Two copies of VA Form 21P-4171 to be completed by two persons who know, as the result of personal observation, the relationship that existed between the parties, and
- Document(s) which show that the parties represented themselves as in a relationship akin to that of marriage.

The verification requirements decreed by the Secretary in Instruction 01-22, which serves as the basis for this general policy statement, afford a relaxed application of the standard within 38 U.S.C. 1541(f)(1), 1304(2), and 1318(c)(1), as well as 38 CFR 3.54

used to grant Survivors Pension and DIC will be applicable for same-sex marriages which occurred up through June 26, 2017. This same principle will be applied to 38 U.S.C. 1311(a)(2) to grant the 8x8 allowance, and thus the liberalized standard with respect to claims under that provision based on deaths occurring on or before June 26, 2025, will be applied.

In some cases, such as those involving domestic partnerships or civil unions, VBA cannot recognize a marriage in a survivor's claim under 38 U.S.C. 103(c), but the case may raise the question of whether the marriage may be considered a "deemed valid" marriage under 38 U.S.C. 103(a). VBA will apply the same rules stated in the general policy statement for determining whether a marital relationship satisfies the duration requirements for Survivors Pension, DIC, or the 8x8 allowance for a same-sex domestic partnership or civil union if it was considered a "deemed valid" marriage under 38 U.S.C. 103(a).

In a similar treatment, if the surviving spouse indicates that their same-sex marriage is a common-law marriage, claims processors must determine whether the same-sex relationship qualifies as a common-law marriage. See evidence requirements in 38 CFR 3.205(a). Claims processors may seek guidance from district counsel as needed. VBA will apply the same rules stated in the general policy statement for determining whether a marital relationship satisfies the duration requirements for Survivors Pension, DIC, or the 8x8 allowance for a same-sex common-law marriage that meets the verification requirements identified within 38 CFR 3.205(a).

Text of Instruction of the Secretary 01-22

SUBJECT: Instructions for Determining Whether Same-Sex Surviving Spouses Satisfy Duration of Marriage Requirements

Purpose

1. In some cases, there is a legal impediment for a same-sex surviving spouse to qualify for Survivors Pension or Dependency and Indemnity Compensation (DIC) benefits due to not meeting the corresponding marriage duration requirements. A more pronounced impediment exists for the higher rate of DIC benefits under 38 U.S.C. 1311(a)(2) (hereinafter referred to as the 8x8 allowance) due to a marriage duration requirement that is wholly unattainable for some individuals who were unable to marry prior to the United States Supreme Court's decision in *Obergefell v. Hodges*. Recognizing that certain same-sex surviving spouses were prevented from marrying at an earlier date by reason of laws that have been found to be unconstitutional, I am instructing Department of Veterans Affairs (VA or the Department) employees to adjudicate claims in a manner that will avoid unfairness to those individuals by not giving effect to those unconstitutional laws. This Instruction provides directions and procedures for making Survivors Pension, DIC, or the 8x8 allowance determinations for particular same-sex surviving spouses.

Background

2. On September 4, 2013, the United States Attorney General announced that the President had directed the Executive Branch to cease enforcement of 38 U.S.C. 101(3) and 101(31), which defined the terms "surviving spouse" and "spouse" for purposes of Veterans benefits as referring only to a person of the opposite sex, to the extent they precluded provision of Veterans' benefits to same-sex married couples. Accordingly, VA ceased to enforce 38 U.S.C. 101(3) and 101(31) and the implementing regulation (38 CFR 3.50), to the extent that they precluded provision of Veterans' benefits to same-sex married couples. The Attorney General's announcement allowed VA to administer spousal and survivors' benefits to same-sex married couples, provided their marriages otherwise met the requirements of 38 U.S.C. 103(c).

3. On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. Accordingly, on October 16, 2015, the Veterans Benefits Administration (VBA) issued VBA Letter 20-15-16 which updated procedures on processing benefit claims involving same-sex marriages and recognized that same-sex marriages will be accepted in benefit determinations without regard to a Veteran's state of residence. This guidance remains in effect.

4. VA administers benefits and programs for the surviving spouse of a Veteran which incorporate evaluations to determine the legality and duration of a marriage. VA must determine the duration of a marriage in order to establish entitlement to Survivors Pension, DIC, or the 8x8 allowance. 38 U.S.C. 1541(f)(2), 1304(2), and 1318(c)(1) are the foundational statutory sources containing one-year duration of marriage requirements for a surviving spouse to qualify for Survivors Pension and DIC. The requirement for the 8x8 allowance under 38 U.S.C. 1311(a)(2) further stipulates that a surviving spouse must have been married to a Veteran for at least a continuous eight-year period immediately preceding the Veteran's death during which a Veteran was rated totally disabled for a service-connected disability.

5. As a result, under statutory requirements currently in effect, a same-sex surviving spouse who was only able to marry after the Supreme Court's decision in *Obergefell* would have been unable to meet the one-year marriage duration requirement until June 26, 2016, for Survivors Pension and DIC benefits, and would similarly have been unable to satisfy the eight-year marriage duration requirement for the 8x8 allowance until June 26, 2023, at the earliest. This results in potential disparate treatment for same-sex surviving spouses who may have otherwise qualified for Survivors Pension, DIC, or the

additional 8x8 allowance if they were not prevented from marrying at an earlier date by reason of laws that have been found to be unconstitutional.

6. Under 38 U.S.C. 103(c), “[i]n determining whether or not a person is or was the spouse of a veteran, the marriage shall be proven as valid for the purposes of all laws administered by the Secretary according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.” While the statute refers to two specific points in time for determining whether the parties attained married status, it is unclear how it should be applied in determining the duration of a marriage over a period of time, particularly when the laws of the relevant place (e.g., a State) have been found to have been unconstitutional for a portion of such period.

7. The Supreme Court has stated that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). VA will follow that approach in interpreting and applying section 103(c) to duration-of-marriage determinations in cases where unconstitutional State laws potentially could affect such determinations.

8. After consulting with the Department of Justice, through this Instruction, I am instructing the Department not to give effect to unconstitutional laws that prevented same-sex couples from marrying when adjudicating duration of marriage issues for purposes of Survivors Pension and DIC benefits, including the 8x8 allowance. This Instruction addresses the legal impediment which a same-sex couple may face in fulfilling the marriage duration requirement under 38 U.S.C. 1541(f)(2), 1304(2), 1318(c)(1), and 1311(a)(2) as well as 38 CFR 3.10(c) and (f)(1) and 3.54. In doing so, the Department will interpret the statutes governing duration of marriage issues based

on the inference that Congress did not intend VA to apply unconstitutional laws to Veterans' detriment. Thus, this Instruction will align policy and procedures applying to particular same-sex surviving spouses' situations for Survivors Pension, DIC, or the 8x8 allowance to better conform with the Supreme Court decision in *Obergefell* and to adjudicate claims in a manner that will avoid unfairness to those individuals.

Qualifying for Survivors Pension, DIC, or 8x8 Allowance

9. The issue this Instruction addresses is the legal impediment which exists for a same-sex surviving spouse seeking Survivors Pension, DIC, or the 8x8 allowance while being unable to meet marriage duration requirements due to a legal impediment that existed under laws now recognized as unconstitutional within U.S. states and territories. In particular, a same-sex surviving spouse may be unable to meet the duration requirement of being married to a Veteran for one year or more prior to the Veteran's death under 38 CFR 3.54 to qualify for Survivors Pension or DIC benefits, or a same-sex surviving spouse may be unable to fulfill 38 U.S.C. 1311(a)(2) for the 8x8 allowance due to the inability to establish a marriage for a consecutive eight-year time period.

Recognizing that U.S. states and territories maintained varying same-sex marriage provisions prior to *Obergefell* and seeking an approach that prevents disparate impact and enables a consistent and equitable application, I have decided to utilize the date of the precedential *Obergefell* decision, June 26, 2015, as the general date that same-sex couples were no longer prevented from marrying for purposes of this Instruction. VA also acknowledges that it may have been impracticable for same-sex couples to have entered a marriage immediately after *Obergefell* was decided. As such, I am instructing VA to similarly apply this Instruction in the case of any same-sex surviving spouse who married a Veteran up through two years after *Obergefell*, i.e., by June 26, 2017.

10. To address the concerns noted above, while ensuring maximum consistency with the statutory requirements regarding duration of marriage, VA will consider a marriage

duration requirement to be satisfied when there is satisfactory evidence that a same-sex surviving spouse was effectively in a marital relationship for the specified period, supporting a conclusion that they would have been legally married for that period but for the unconstitutional state laws. In applying this standard, VA generally will follow the same evidentiary rules applicable in establishing any marital relationship. A same-sex surviving spouse will be required to provide verification that they were legally married to the Veteran at the time of the Veteran's death; that they held themselves out to the public as being in a committed relationship akin to that of marriage; and that they cohabitated, as evidenced through statements of persons in the community who knew the parties as akin to spouses and documents which show that the parties represented themselves as being in a committed relationship akin to that of marriage (see evidence requirements in 38 CFR 3.205(a)), for a minimum of one year prior to the Veteran's death for Survivors Pension and DIC. This Instruction will similarly be applied for awarding the 8x8 allowance if the surviving spouse is able to provide the same verification for a period of eight consecutive years prior to the Veteran's death during which time the Veteran was rated totally disabled for a service-connected disability.

11. The verification requirements in this Instruction to afford a relaxed application of the standard within 38 U.S.C. 1541(f)(1), 1304(2), and 1318(c)(1), as well as 38 CFR 3.54 used to grant Survivors Pension and DIC, will be applicable for same-sex marriages which occurred up through June 26, 2017. This same principle will be applied to 38 U.S.C. 1311(a)(2) for purposes of the 8x8 allowance, and thus the Instruction will be applied with respect to claims under that provision based on deaths occurring on or before June 26, 2025.

Applicability

12. This Instruction applies to all claims that are pending and nonfinal on the date of this instruction, and any original, supplemental, or other claims filed on or after the date of

this Instruction, in which a same-sex surviving spouse seeks Survivors Pension and DIC based upon a marriage occurring no later than June 26, 2017. This same principle applies to a same-sex surviving spouse who seeks the additional 8x8 allowance based on deaths occurring on or before June 26, 2025.

Effective Dates

13. Effective dates for VA benefits are governed by 38 U.S.C. 5110. Benefits generally are paid from the date of the claim. However, pursuant to 38 U.S.C. 5110(g), the effective date of an award based upon a liberalizing “administrative issue” may be up to one year prior to the date of the claim, but in no event prior to the effective date of the administrative issue. With respect to the marriage duration requirements of 38 U.S.C. 1541(f)(2), 1304(2), 1318(c)(1), and 1311(a)(2) for same-sex surviving spouses who were married to the Veteran and fulfill the relationship verification standards for establishing that they were effectively in a marital relationship, this Instruction may be characterized as a liberalizing administrative issue, such that associated effective dates may be governed by 38 U.S.C. 5110(g).

14. Therefore, the effective date to grant Survivors Pension, DIC, or the 8x8 allowance for a same-sex surviving spouse who married the Veteran and met the verification requirements outlined within this Instruction should be assigned as follows:

a. If the claim was pending and nonfinal on October 11, 2022, VA will apply 38 U.S.C. 5110(g) and 38 CFR 3.114 to assign an effective date, fixed in accordance with the facts found, as early as October 11, 2022.

b. If the claim was received after October 11, 2022, VA will apply 38 U.S.C. 5110(g) and 38 CFR 3.114 to assign an effective date, fixed in accordance with the facts found, as early as October 11, 2022, if the claimant files a claim within one year of the date of this Instruction. However, the effective date may not be retroactive for more than one year from the date of receipt of the claim. To be entitled to benefits for up to one year prior to

the date of the claim under 38 CFR 3.114, the claimant must have met all eligibility criteria on the date of the liberalizing change in law or liberalizing issue. For these purposes, the date of the liberalizing change in law is October 11, 2022, and a claimant may be considered to have met the basic entitlement to Survivors Pension or DIC or the additional 8x8 allowance eligibility criteria on that date if they fulfill the relationship verification standards for establishing that they were effectively in a marital relationship.

c. If a claim was previously and finally decided prior to October 11, 2022, and the claimant was either denied benefits or a DIC benefit was awarded without the additional 8x8 allowance which would have been granted under the procedures identified within this Instruction, then the surviving spouse is required to file a new claim in a timely manner to satisfy the effective date requirements under 38 CFR 3.114, as noted above. In such cases, apply the effective date guidelines identified in paragraph b. above.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on November 3, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,
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